

1 Kenneth Donald McCurdy
2 C-76230 ED-184-L
3 P.O.Box 689
4 Soledad, Ca.
5 93960-0689

IN-PRO-PER

FILED

APR 23 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 OAKLAND DIVISION
11

12
13 KENNETH DONALD McCURDY,
14 v. Petitioner,
15 BEN CURRY, Warden, et al.
16 Respondent

Judge: The Honorable
Claudia Wilken

CV-07-05084 CW

REPLY TO RESPONDENT'S
ATTORNEY'S ON SECOND
MOTION TO DISMISS

17
18 On April 9, 2008, Respondent's attorney's filed with this
19 court an opposition to petitioner's traverse on grounds
20 that he again failed to provide this court with adequate
21 pleadings and failure to cite any legal authority's when
22 challenging the respondent's use of [AEDPA] and cited the
23 misuse of EX POST FACTO law, Petitioner has stated to this
24 court that he is a layman of the law and as such does not
25 have at his disposal a computer to call up all the case
26 history or case law and must use what is available to him
27 through this facility's libraries at the Central Facility
28 and can only use that when Central Facility is not on First

1 Watch Status,, Petitioner does not live with-in the Central
2 Facility but rather in a Dorm located outside the building
3 and must have a pass to enter the facility. The petitioner
4 must work 10 hours per day, four days per week to maintain his
5 position as a worker at P.I.A. Furniture Factory therefore
6 the petitioner is further restricted as to the use of any
7 legal material other than the limited issue that is available
8 with-in the East Dorm housing unit.

9 Petitioner contends that he has presented to the California
10 Supreme Court ALL issues that he ask this court to address
11 under the Federal Constitutional Amendments.

12 The Petitioner has brought forth the issue of Due Process
13 and Liberty Interest, The respondents attorney Stacey Schesser
14 has introduced the issue of Plea bargains in her respose
15 and further introduced issues that the petitioner did not
16 place before this court, therefore the pettioner now ask that
17 this court admit the plea bargain and all documents pertaining
18 to that plea bargain since the attorney opened the door so
19 to say in a layman's terms.

20 The petitioner further ask the court to order a motion of
21 discoverey for the records of the petitioner's plea agreement
22 made in chambers under the guidance of the Honorable Superior
23 Court Judge **W. STONE**, Kern County, State of Calornia,
24 Since the petitioner was advised that those tapes had been
25 distroyed,(because the petitioner failed to file an appeal
26 with-in five years). Since the plea was for 15 years to Life,
27 the petitioner had no reason to file as he was under the
28 impression that he would be released as the plea bargain

1 stating that his release would be between 10 and 12 years
 2 therefore the petitioner had no reason to file an appeal.
 3 It was and is the understanding of the petitioner that **ANY AND**
 4 **ALL RECORDS PERTAINING TO THE ARREST, CONVICTION, INCARCERATION**
 5 **OR PAROLE, MUST BE MAINTAINED UNTIL THE COMPLETION OF THE**
 6 **SENTENCE.** Since the tapes of the plea bargain was destroyed
 7 the petitioner has no recourse other than this court's action.
 8 To address the issue of the attorney's contention of the
 9 **[ADEPA]** and the petitioner's use and failure to cite legal
 10 authorities the petitioner now enters the following :

11 **NULPH v. FAATZ**, 27 F3d 451 (9th Cir. 1994)

12 Penal Law that is applied retrospectively to the disadvantage
 13 of the offender is unconstitutional EX POST FACTO.....

14 **US v. TAPIA**, 981 F2d 1194 (11th Cir. 1993)

15 "New Law may **ONLY** be applied to conduct occurring after date
 16 of enactment."

17 Therefore the petitioner contends that the utterance of the
 18 words EX POST FACTO has an automatic understanding and not
 19 to be construed as an error on the petitioner's failure to
 20 cite, and therefore not a reason to dismiss.

21 As the attorney for the respondent did in fact open
 22 a venue of the petitioner's plea agreement the petitioner now
 23 brings before this court the following in support of:

24 **BAR MK RANCHES v. YEUTHER**, 994 F2d 735 (10th Cir. 1993)

25 "Administrative agencies are required to follow their own
 26 regulations".

27 **CALDWELL v. MILLER**, 790 F2d 589 (7th Cir. 1986)

28 **PAYNE V. BLOCK**, 714 F2d. 1510 (11th Cir. 1984)

1 "An inmate has the right to expect prison officials to follow
2 it's policies and regulations".

3 HALL v. LOMBARDI, 996 F2d 954 (8th Cir.1993)

4 " When prison regulations contain language of mandatory
5 nature,(shall,will,must) they are interpreted as "Protectable
6 Liberty Interest".

7 FOLEY COUNTY v. US, 11 F3d 1032 (Fed Cir. 1993)

8 "Contract interpretation begins with plain language of agreement".

9 ESTELLE v. GAMBLE, 429 US 97 50 1ed 2d 251, 97 Sct 285 1976

10 " Detention beyond the termination of the sentence constitutes
11 cruel and unusual punishment when it results from deliberate
12 indifference in the liberty of the petitioner".

13 US v. MYERS, 32 F3d 411 (9th Cir. 1994)

14 Harmless error rule does not apply to law of contractual
15 Plea Agreements.

16 The California rules governing parole in murder cases, for
17 which parole eligibility is provided by statute, are as follows

18 [P]arole eligibility is the rule, rather than the exception.

19 [P]arole is "NORMALLY" to be granted. The murder giving rise
20 to incarceration must be "particularly egregious" for the
21 parole to be denied. Indeed, a murder must be "heinous, atrocious
22 or cruel", if, as here, the offense is to serve as the basis for
23 parole denial. In addition, in such cases, the prisoner must
24 presently present a danger to society, In this case petitioner
25 has presented the court with the documents as to the current
26 danger authored by Dr. MacComber, Phd. in his report to the
27 Parole Board.

28 The parole board failed to show that this crime of second (2nd)

1 degree murder was more cruel or vicious than the ordinary
2 second degree murder, But rather the parole board must show
3 that petitioner shows a current risk to the public safety.
4 The record absolutely show no evidence that would meet the
5 criteria that the petitioner would pose any danger at all
6 to society.

7 **CONCLUSION**

8 The petitioner now humbly ask this most honorable court to
9 extend the petitioner right to amend the writ of habeas
10 Corpus and incorporate the above to further the Show Cause
11 Order issued by this court.

12 Issue an order for:

- 13 1. That this writ stand as ordered for show cause.
- 14 2. That petitioner did in fact offer to the California
15 Supreme Court all documents .
- 16 3. That the motion to dismiss under 28, USC §2254 and Rule
17 4, of the rules governing §2254. be dismissed and that
18 the original writ stand on it's merits.
- 19 4. That this court except this instrument as an answer to
20 the A.G's reply of April 9, 2008.

21 Respectfully Submitted:

22 Kenneth D. McCurdy In PRO-Per

23 
24

25 DATE: APRIL 15, 2008
26
27
28

PROOF OF SERVICE BY MAIL

BY PERSON IN STATE CUSTODY

(Fed. R. Civ. P. 5; 28 U.S.C. § 1746)

I, Kenneth D. McCurdy, declare:

I am over 18 years of age and a party to this action. I am a resident of _____

California Training Facility Prison,

in the county of Monterey,

State of California. My prison address is: Kenneth McCurdy C-76230 ED-184-L
P.O.Box 689, Soledad, Ca. 93960-0689

On April 15, 2008
(DATE)

I served the attached: Reply to Respondent's attorney

(DESCRIBE DOCUMENT)

on the parties herein by placing true and correct copies thereof, enclosed in a sealed envelope, with postage thereon fully paid, in the United States Mail in a deposit box so provided at the above-named correctional institution in which I am presently confined. The envelope was addressed as follows:

Office of the Clerk
US District Court
Northern District of Ca.
1301 Clay Street Suite 400 S
Oakland, California 94612-5212

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 15, 2008
(DATE)

Kenneth D. McCurdy
(DECLARANT'S SIGNATURE)